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OCTOBER TERM, 1968.

No. 463.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
WYMAN-GORDON COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION OF RESPONDENT FOR LEAVE TO FILE SUPPLEMENTAL BRIEF.

The Respondent in the above-entitled cause respectfully moves this Court for leave to file the accompanying Supplemental Brief, pursuant to Rule 41(5). Both the Petitioner and the Solicitor General have advised Respondent that they have no objection to the filing of this Supplemental Brief.

In support of this motion Respondent shows that since the filing of its Brief and argument before the Court, material originally submitted to the Ervin Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, regarding its investigation of the National Labor Relations Board was first made public. This material is reported at 39 Daily Labor Report, pp. D-1 *et seq.*, and

includes a memorandum most relevant to this cause written by James R. Wason, Specialist in Labor Economics and Relations, Economics Division, Legislative Reference Service, Library of Congress, and prepared at the request of Hon. Sam J. Ervin, Jr., and Hon. Everett McKinley Dirksen.

The above described material was published on February 27, 1969 and was not received by Respondent until March 4, 1969. Because this information was not available in time to have been included in Respondent's Brief in chief, or in its argument, and because Respondent desires to bring this information to the attention of this Court, Respondent seeks leave to file this Supplemental Brief.

Conclusion.

For the foregoing reasons, this motion for leave to file a Supplemental Brief should be granted.

Respectfully submitted,

QUENTIN O. YOUNG,
294 Washington Street,
Boston, Massachusetts 02108,
Attorney for Respondent.

Of Counsel:
SHEPARD M. REMIS,
HERRICK, SMITH, DONALD, FARLEY & KETCHUM,
294 Washington Street,
Boston, Massachusetts 02108.

March 7, 1969.

In the Supreme Court of the United States.

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No. 463.

NATIONAL LABOR RELATIONS BOARD,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

During the Ninetieth Session of Congress during 1968, Sen. Samuel J. Ervin, Jr., as chairman of a special subcommittee on separation of powers, a part of the Government Operations Committee, conducted numerous hearings in regard to the administration of the National Labor Relations Act by the National Labor Relations Board. This subcommittee's report has not as yet been issued, but on February 27, 1969, this subcommittee did issue certain memoranda of law which were supplied to the subcommittee by the Library of Congress Legislative Reference Service.

Among the memoranda was one prepared by James R. Wason, Specialist in Labor Economics and Relations, Economics Division, Legislative Reference Service, Library of Congress, dated March 22, 1968 (see Appendix).

The conclusions set forth in this memorandum are particularly pertinent to the issues in the instant proceeding. Mr. Wason poses the following problem:

> "What does the analysis suggest might be done to meet the more fundamental criticism? How can labor and management know better what is expected of each under the Labor-Management Relations Act? How can both secure justice, swift and sure, under its provisions?"

In a partial response to the situation, the memorandum says:

> "The examination which has been made suggests the conclusion that the main reason justice is delayed under the Act is because justice under the Act is not sure. The Board has failed to make clear to labor and to management what it thinks the Act requires. It has created a lawyers' paradise and a legal nightmare of endless rows of case decisions. It makes policy by rummaging among these, selecting and modifying precedents to suit its current requirements. And under our judicial procedure, this manufacture of policy by basing on, developing, and departing from prior precedent is accepted as being standard judicial practice, as, indeed, it is." (Footnote omitted.)

In conclusion, the memorandum says:

> "Our suggestion, and our second point, is that the Board should codify its opinions and reduce them to a series of regulatory bulletins. It does not have to make law, case by case. It could work out its policy, put it in the form of regulations, run them through the Administrative Procedure Act, and put them out for every

member of labor and management to read. After thirty years they are, save for new situations, established. They need only be codified.

"'These bulletins will spell out for all to understand just what our labor policy is under the Act. The regulations could be followed up by the issuance of interpretative bulletins, informative releases, and, if desired (it is certainly needed), a nationwide informational campaign to tell labor and management of their rights and duties under the Act. It might thus fill the informational gap which exists today between the decisions of the Board and the very informative speeches, delivered only to small groups of labor experts, by the Board's members and the General Counsel.

"'By codifying its requirements, the Board would, of course, divest itself of much of its case load. An employer or a labor leader reading in a regulation what the Board expects will find he need consult his attorney only to make certain he is living up to the requirements of the law, not to find out what they are. The law should be made accessible to those who are required to live by it and whose rights depend upon its meaning. Employees and employers should not be required to go to court to find out what their rights are.''

It is respectfully submitted that the errors of the National Labor Relations Board in promulgating the *Excelsior* rule by an *ad hoc* adjudication rather than the exercise of its rule-making powers under the Administrative Procedure Act are within the direct thrust of the recommendations contained in the memorandum of Mr. Wason.

While the memorandum to the Committee on Separation of Powers suggests legislative action to require the Board

to make complete use of its rule-making powers under the Administrative Procedure Act, it is respectfully submitted that this Court has similar powers to require the Board to follow the Administrative Procedure Act by adopting the decision of the Court below in the instant proceeding.

Respectfully submitted,

QUENTIN O. YOUNG,
294 Washington Street,
Boston, Massachusetts 02108,
Attorney for Respondent.

Of Counsel:
SHEPARD M. REMIS,
HERRICK, SMITH, DONALD, FARLEY & KETCHUM,
294 Washington Street,
Boston, Massachusetts 02108.

March 7, 1969.

Appendix.

The National Labor Relations Act and the National Labor Relations Board

PREPARED AT THE REQUEST OF HON. SAM J. ERVIN, JR. AND HON. EVERETT MCKINLEY DIRKSEN

(By James R. Wason, Specialist in Labor Economics and Relations, Economics Division, Legislative Reference Service, Library of Congress, March 22, 1968)

Introduction

Justice, to be effective, must be both swift and sure. This, in effect, was the rule laid down in the 18th century by one of the first criminologists, Cesare Beccaria:

"The more immediately after the commission of a crime, a punishment is inflicted, the more just and useful it will be."

"Crimes are more effectually prevented by the *certainty* than by the *severity* of punishment."

The quotations are taken from pages 74 and 98 of the 3rd edition of an English translation of his *Essay on Crime and Punishment,* printed in London in 1770.

On this score the National Labor Relations Act is to be faulted. It does not afford either a sure guide to labor-management relations nor are proceedings under it productive of swift justice.

Such, at least, are the conclusions reached after an extended consideration of the history of the Act in its various forms and under its various administrators. (See Part II below.) The problem is here deliberately posed, however, as one concerning the National Labor Relations Act, not the National Labor Relations Board. There have

been many Boards. Some have been accused of having favored labor and some management; none have ever escaped such criticism. But as the survey will show, the criticism of true bias has seldom been sustained. Few Boards did not in the course of their deliberations sooner or later experience criticism of bias from both labor and management; indeed, the responsibilities of the Board are such that criticism is to be expected of any Board which is doing its job.

It is not the expected charge of bias which is most significant to the present examination of the work of the Board. Rather, it is the persistent underlying criticisms which go back to the origins of the Act in the deliberations of the Board's predecessor agencies before the enactment of the Wagner Act. (See Part III below.) First is the repeated complaint that the Act does not provide a certain mandate for those who are required to conduct their affairs in accordance with its provisions. Second, that in administering the Act, the Board is not only uncertain in its deliberations, but slow, and that implementation of its findings are so delayed that they lose much of their effect.

There is, to be sure, a degree of bias connected with these underlying critical themes. That the justice afforded under the Act is not sure has been most frequently asserted by the spokesmen for management. That it is delayed, weak, and uncertain in its remedy has been more often claimed by labor. However, neither side has ignored either charge. More important, it is these criticisms of the workings of the law which most concern us here where the means to the ends of the law, not the ends themselves, are our primary concern. How can these means be better made to serve these ends? (See Part IV below.)

I. THE NATIONAL LABOR RELATIONS ACT AND THE SEPARATION OF POWERS

Before turning to the history of the Act, it may serve to avoid some confusion to examine the question of how the question of separation of powers arises in the administration of the Act.

We shall not go deeply into the areas of constitutional law and legal philosophy involved. The doctrine of the separation of powers arises under our Constitution primarily by the division of responsibility between our legislative, executive, and judicial bodies. However, the Constitution provides also for checks and balances—that is to say, it makes each branch of our government the guardian of the rights of citizens with respect to the exercise of power by each other branch, by enabling each to resist, at least to a degree, encroachment on its own powers. Each checks the other.

Separation of powers can then be seen as a process of conflict, with each branch at once standing off all other branches in their assault on its powers while at the same time, in that defense, encroaching on the assumed area of responsibility of each other branch. Such an approach is necessary if public rights are to be protected; each branch claims to serve the public interest by curbing each other branch, thus having all such encroachments on the public appear first as threats to its own authority. Then, in defending itself, each branch defends the public.

The analogy of the principle expressed here to the idea that out of competition comes economic efficiency will appeal to any economist. More generally, the biological principle of the competition of individuals underlying the preservation of species will be recalled by some readers.

Out of this simple principle of the separation of powers have arisen serious problems of how complex problems of

governmental regulation are to be accomplished where more than one branch of government had a role to play in their solution. The dilemma has been resolved by development of the concept of the regulatory commission to which is delegated by Congress elements of the authority exercised by each branch of the government.

That the Congress has the authority to make such a delegation indicates that, in the allocation of governing power, Congress is supreme. The corollary of possession of such power of delegation is the accompanying responsibility for the Congress to exercise, through the process of legislative oversight, control over the exercise of these delegated powers in accordance with its intent in making the delegation.

The problems connected with the Congressional oversight of the members of what has been called the "headless fourth branch" of the government are well known. Regulatory commissions are not subject to effective executive supervision. They may be subject to judicial control, but because of their quasi-judicial nature, the control may not be as objective as with a more purely executive agency. A presumption of juridically correct construction may inhibit the courts. As "arms" of the Congress and its creation, their control devolves then more upon the Congress. The ordinary checks and balances are not present to the same degree as in the other branches without such commissions.

The methods by which Congress may control the regulatory commissions are:

(1) Through the power of the Senate to reject nominees to the commissions;

(2) By prescribing the terms and qualifications of members and limiting the authority of the President to remove them;

(3) By the annual review of the actions of commissions during the appropriations hearings;

(4) By amendment of the statutes; and

(5) By the exercise of legislative oversight by supervisory committes.[1]

It is with the last of these that we are here concerned.

It may surprise some to have the National Labor Relations Board referred to as a "regulatory commission." However, it *is* a regulatory commission and has been considered to be such since its inception. For example, the Hoover Commission task force report on *Regulatory Commissions*, January 1949[2] lists it among the ten independent regulatory agencies at the time, together with the Interstate Commerce Commission, the Maritime Commission, the Civil Aeronautics Board, the Federal Power Commission, the Federal Communications Commission, the Securities and Exchange Commission, the Federal Reserve Board, the Federal Trade Commission, and the Atomic Energy Commission.

There were and are other regulatory agencies within departments, such as the Food and Drug Administration in the Department of Health, Education, and Welfare and the Wage and Hour and Public Contracts Divisions in the Department of Labor, but these ten are the ones usually considered the *independent* regulatory agencies.

These agencies have been set up at different times for differing purposes covering many areas of economic and social activity. What they have in common is that they have been established by the Congress to protect the public interest and serve the general welfare. The means used

[1] George B. Galloway. The Legislative Process in Congress, New York, 1953, p. 87.

[2] Commission on the Organization of the Executive Branch of the Government. Task Force Report on Regulatory Commissions. U.S. Government Printing Office, 1949.

to accomplish these ends has been to delegate to each agency substantial power to issue the regulations and orders it deems necessary to carry out the provisions of the statute establishing the agency. Thus, Section 6 of the Labor Management Relations Act, 1947, reads as follows:

"The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act."

II. THE NATIONAL LABOR RELATIONS BOARD AND ITS CRITICS[3]

A. *From 1938 to Taft-Hartley*

The National Labor Relations Act (Wagner Act), as it exists today in amended form, is Title I of the Labor-Management Relations Act, 1947, commonly known as the Taft-Hartley law. When the Wagner Act was enacted in 1935, it had little support from any sources other than Congress and, apparently, the people. Management opposed it. Some contemporary unions apparently felt there might be an adverse effect of some of the provisions of the bill upon the structure of their organizations. Indeed, the bill did not receive the full support of President Roosevelt and other high-ranking members of his Administration.[4]

Shortly after its passage and before the work of the new agency could get under way, the National Lawyers Com-

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[3] This section borrows liberally from the two following articles by Gene S. Booker and Alan C. Coe: "The NLRB and Its Critics." *Labor Law Journal*, v. 17, No. 9 (September 1966); and "The Labor Board and Its Reformers," *op. cit.*, v. 18, No. 2 (February 1967).

[4] Leon H. Keyserling "The Wagner Act: Its Origin and Current Significance," *George Washington Law Review*, v. 29, No. 2 (December 1960), p. 202.

mittee of the American Liberty League issued a 132-page "Report on the Constitutionality of the National Labor Relations Act." This brief asserting the law's unconstitutionality was sponsored by 58 lawyers, all men of distinction and success, coming from all parts of the United States. Their number included a former Attorney General and two former Solicitors General of the United States. The result was that, as might be expected, until the constitutionality of the law was finally resolved in April of 1937,[5] enforcement of its provisions was a practical impossibility. Thus, for the first two years of its life, the criticisms of the Board were lost in the denunciation of the "unconstitutional" Act.

It was during this initial period, however, that the event took place which conditioned the direction of the substantive criticism of the Board in the period down to the onset of World War II. This was the split in the American labor movement. When the law was enacted in July of 1935, there was one labor movement—the AFL. In November of that year, there were two—the AFL and the CIO. A basic duty of the Board was to determine which labor unions were appropriate units for collective bargaining purposes under Section 9(b) of the Act. But in any given case the Board would have to offend the AFL if their decision favored more the position of the CIO, and vice versa.

Initially, the Board ruled on the Globe case[6] that employees could select a craft unit to represent them even if it meant establishment of a separate bargaining unit. This ruling pleased the AFL and craft unions generally. But

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[5] In a series of five decisions: *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1; *NLRB* v. *Fruehauf Trailer Co.*, 301 U.S. 49; *NLRB* v. *Friedman-Harry Marks Clothing Co.*, 301 U.S. 58; *Associated Press* v. *NLRB*, 301 U.S. 103; and *Washington, Virginia and Maryland Coach Co.* v. *NLRB*, 301 U.S. 142, all 1937.

[6] Globe Machine and Stamping Co., 3 NLRB 294 (1937).

in 1939 in the American Can Company case [7] the Board reversed itself and ruled that craft units might not separate from an industrial unit if the craft workers were integrated into that unit. Neither the AFL nor business liked this ruling which strengthened the CIO and large industrial unions.

These are by no means the only cases bearing on the inter-union rivalry of the AFL and the CIO in this period. Nor was the American Can Co. case the final word of the Board with respect to craft severance.[8] But the problem facing the Board was clearly that no matter how it ruled it was criticized.

Out of these charges of bias came much of the initial impetus for Congressional action to amend the National Labor Relations Act or to investigate the National Labor Relations Board. Hearings were held in 1939 and 1940 by the House Committee on Labor, the Senate Committee on Education and Labor and, more significantly, by the so-called "Smith committee," the House Special Committee to Investigate the NLRB.[9]

While much of the scope of these hearings concerned charges of bias, communism, and one-sided administration of the law, the substance of the criticisms which received the most serious consideration by the Congress in these years concerned a problem which involved the question of the separation of powers. The Act provided that the NLRB was to be solely responsible for the investigation, prosecution and adjudication of unfair labor practice cases,

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[7] American Can Co., 13 NLRB 1252 (1939).

[8] International Minerals and Chemical Corp., 71 NLRB 878 (1946).

[9] U.S. Congress, House of Representatives, Special Committee to Investigate the National Labor Relations Board. *Hearings, National Labor Relations Act,* 76th Congress, 2d session, 1939.

which constituted the heart of Board responsibility. There was much criticism of the Board's handling of this multiple responsibility.

One bill, S. 1398, introduced as early as 1939 by Senator Holman, addressed itself to the problem of separating the prosecuting and adjudicating functions of the Board. It proposed to do this by creating a Labor Relations Commissioner in the Department of Labor to investigate and prosecute charges before a Labor Appeals Board. The introduction of this bill followed upon the support at their 1938 annual convention by the AFL of the principle of separating the administrative from the judicial functions of the Board.

The Smith committee reported a bill, H.R. 8813, in March of 1940 which provided for the establishment of an independent administrator to investigate and to prosecute unfair labor practice charges before the Board. The bill, with some amendments requested by the AFL, passed the House in June of 1940. However, the Senate Committee on Education and Labor took no action to report the bill and it died in committee. In part this failure to act reflected opposition to the bill, and in part it reflected a feeling that the then pending Walter-Logan bill [10] establishing a code of procedure for all administrative agencies would take care of some of the administrative problems under the NLRA.

None of these cited hearings were, however, the first to examine the operations of the Board and the administrative problems arising under the Act. The first hearings were held in 1938 by a subcommittee (appointed for the purpose) of the Senate Committee on the Judiciary, under the chair-

[10] This eventually became the basis for the Administrative Procedure Act of 1946 (60 Stat. 237).

manship of Senator Neely.[11] This subcommittee considered a resolution, Senate Resolution 207, introduced in the 3rd session of the 75th Congress by Senator Burke. This resolution charged the Board with "continuous and flagrant violation of the will of the Congress" and with having failed to have conducted its proceedings "in the impartial manner required by a body exercising judicial or quasi-judicial powers . . . ." and asked for an investigation of the Board.

After hearing Senator Burke, Chairman Madden of the Board, and Senator Thomas, chairman of the Senate Committee on Education and Labor, the subcommittee voted to report the resolution to the full committee adversely, on the grounds that any investigation of the National Labor Relations Board should not be conducted by the Judiciary Committee. In this it was sustained by the full committee, including Senator Burke himself.

One piece of information brought out at the hearings undoubtedly lent substantial weight to the decision of the committee not to press for an investigation. In addition to being able to point to the favorable decisions of the Supreme Court sustaining the Act, it was also brought out by Chairman Madden that the Board had been sustained in 21 out of 23 cases decided by Circuit Courts of Appeal, and in 96 out of 97 cases filed in District Courts.

The latter cases were especially convincing. All involved efforts to prevent the functioning of the Board by filing requests for injunctions in the District Courts. Despite the fact that the Act gave jurisdiction to review Board proceedings only to the Circuit Courts, the District Courts had accepted jurisdiction in these cases.

In about 40 cases preliminary restraining orders were granted by the District Courts. In 20 cases injunctions

[11] U.S. Congress. Senate. A Subcommittee of the Committee on the Judiciary. *Hearings, Investigation of the National Labor Relations Board*, 75th Congress, 3d session, 1938.

were issued, so that appeals by the Board were necessary. In 15 cases petitions for certiorari were made to the Supreme Court. The Supreme Court sustained the Board in its interpretation that the District Courts were without jurisdiction in every case. Clearly, whatever might be said about the bias of the Board, in its exercise of the powers granted it by the Congress, it was being upheld by the courts.[12]

The criticisms made both in and out of Congress of the lack of an internal separation of functions led to administrative changes by the Board itself in the early 1940's, which were designed to accomplish such a separation. The need had been further pointed up by the recommendations to this effect by the Attorney General's Committee on Administrative Procedures.[13]

Staff personnel were divided between those engaged in decision making and those engaged in investigating and prosecuting. Board members were removed from the prosecuting functions. In the Regional Offices of the Board, investigating and prosecuting functions were separated from those dealing with representation elections. Complaints were to be issued only by Regional Directors. Hearings were to be conducted only by Trial Examiners assigned from Washington.

These changes were sufficiently successful in meeting the suggested standards that when the Administrative Procedures Act [14] was passed in 1946, the Board was able to meet the Act's requirements for internal separation of functions by making only minor adjustments in its procedures.

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[12] *Ibid.*, p. 59.

[13] U.S. Congress. Senate. Attorney General's Committee on Administrative Procedures. *Final Report*, Senate Doc. No. 8, 77th Congress, 1st session, p. 158–160.

[14] See footnote 10.

These changes did not satisfy the critics of the Board, however.

During the war many proposals had been advanced to abolish the Board and divide its functions among two or more agencies. Most of these followed along the lines of the original Smith bill, cited above. In the 79th Congress there was, for example, the Hatch-Burton-Ball bill, S. 1171. This would have abolished the NLRB and established a five-member Federal Labor Relations Board to determine representation and certification issues. Disputes over unfair labor practices would be investigated and adjudicated by an Unfair Labor Practices Tribunal.

Representative Smith reintroduced his bill in the 80th Congress as H.R. 8. This would have provided for an independent administrator to investigate and prosecute cases before the Board. A bill introduced by Senator Ball, S. 360, would have given all investigating and prosecuting functions to an Assistant Attorney General in the Justice Department. Other proposals were discussed which would have had the NLRB act only as a fact-finding agency and judicial body and would have given enforcement and prosecution under the Act to the Department of Labor.

The most important bills in the 80th Congress were, of course, those which culminated in the Taft-Hartley Act—Representative Hartley's bill, H.R. 3020, and Senator Taft's bill, S. 1126. As passed by the House, the Hartley bill would have abolished the National Labor Relations Board and divided its functions. An independent administrator would investigate cases and prosecute them before a quasi-judicial Labor-Management Relations Board. Senator Taft's bill made only relatively minor changes in the administration of the Act.

The result was the compromise establishing within the Board the Office of General Counsel. This official was

given the authority to issue complaints and prosecute cases before the Board. This was one of two major administrative changes in the Act which came out of the major revisions made by the Taft-Hartley amendments.[15] The attention of the Congress, and, indeed, the country, had been on the substantive changes: the addition of unfair labor practices by labor to the law, and the problem of handling emergency strikes.

Apparently, too little consideration was given to the fact that procedural delays in the law would from now on harm not only the rights of workers to organize, but also the rights of workers to refrain from organization, and the rights of management to be protected from the illegal acts of unions.

B. *From Taft-Hartley to Landrum-Griffin*

The problem of oversight under the amended Act were considered as early as 1949 in the Task Force Report on Regulatory Commissions of the Hoover Commission. The position of General Counsel was noted as being independent not only of the Board but of any other agency of the government. The Report recommended that a Council of Labor be established under the Secretary of Labor which would include in its membership the General Counsel.[16]

This was followed by proposals in both Houses of the 81st Congress to abolish the office of General Counsel. The proposal passed the Senate and was favorably reported in the House, but was not acted on further and did not be-

[15] P.L. 101, 80th Congress, 1st session (June 23, 1947). The other, the increase in the size of the Board from three to five members, had little effect on administrative procedures.

[16] Commission on Organization of the Executive Branch of the Government. *Task Force Report on Regulatory Commissions.* Appendix N, Part XIII, January 1949, p. 140–141.

come law.[17] The reasoning of the committees reporting the bills was that internal separation of powers of the agency was guaranteed by the Administrative Procedures Act and that the position of General Counsel was not needed.

In the 2d session of the 81st Congress, Reorganization Plan 12 was forwarded by the White House. The plan would have abolished the Office of General Counsel and transferred its functions to the Board and its chairman.[18] The Senate rejected the plan. Senator Taft, however, introduced S. 3339 as a substitute for Plan 12. This would have created an independent executive agency, the Office of the Administrator of the NLRA. This bill was not acted on. Senator Taft included essentially the same proposal in his 1953 amendments. The new office would have had complete authority to receive and prosecute unfair-practice charges and representation petitions and the conduct of representation elections. He would also have had complete authority over all NLRB personnel. The Board enlarged to seven would have become more like a labor court in its operations.[19] These proposals received support from management representatives, as Reorganization Plan 12 had received support from labor, but no action was taken.

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[17] U.S. Congress. House of Representatives. Committee on Education and Labor. *National Labor Relations Act of 1949*, Report No. 317, 81st Congress, 1st session; U.S. Congress. Senate. Committee on Labor and Public Welfare. *National Labor Relations Act of 1949*, Report No. 99, 81st Congress, 1st session.

[18] Reorganization Plan No. 12 of 1950, transmitted to the Senate and House on March 13, 1950, pursuant to the provisions of the Reorganization Act of 1949, 81st Congress, 1st session. Rejected by S. Res. 248, 81st Congress, 2d session.

[19] Senator Taft introduced a series of bills amending the Taft-Hartley Act in 1953. These included S. 655, S. 656, S. 657 and S. 659, 83rd Congress, 1st session. The bill which made the administrative changes was S. 659.

The Task Force on Legal Service and Procedure of the second Hoover Commission noted in its report in 1955 that controversies between the Board and the General Counsel had hampered the enforcement of the Act. It recommended that the General Counsel be made responsible to the Board and that the problem of internal separation of powers be secured by strengthening the Administrative Procedures Act.[20]

One major problem which arose with the division of responsibility between the Board and the General Counsel was the question of who should issue complaints. The Taft-Hartley amendments had given the General Counsel, at section 3(d), "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints." Authority to issue complaints was delegated to the Regional Directors of the Board, but there was no appeal from a refusal by the Directors to act, save to the General Counsel himself. As early as 1949 the House Committee on Education and Labor had noted that, by refusing to issue a complaint, the General Counsel could control the kind of cases which would be heard by the Board. It was thus felt that he was infringing in the determination of labor policy, a responsibility which had been delegated by the Congress to the Board, not to the General Counsel.

The solution demanded was for the establishment of an appeals procedure. This proposal was supported by the 1949 Hoover Commission Task Force [21] but, as noted, no action was taken. Subsequently other proposals were made, short of appeal, such as a suggestion from the House of Delegates of the American Bar Association in 1958 that,

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[20] Task Force on Legal Service and Procedure. *Report on Legal Services and Procedure.* Prepared for the Commission on the Organization of the Executive Branch of the Government, March 1955, p. 281.

[21] See footnote 16.

when a complaint was dismissed, a detailed statement of explanation would be required.

The question of delay in the adjudication of unfair labor practice cases and in the determination of representation issues is one which has received much attention in the period since 1959 and will be considered more extensively below. In the early days of the Act, it was accepted to a degree that a backlog of cases would normally exist. The two-year delay from 1935 to 1937 in securing managerial acceptance of the constitutionality of the Act assured this.

Nonetheless, it was soon recognized that any means which would shorten the time required to investigate and decide cases should be considered. At first the Board investigated cases itself. This quickly gave way to the use of Trial Examiners who conducted hearings and reported their findings to the Board, together with a recommendation order as to the disposition of each case. However, these reports were neither binding nor final, and there was no requirement that the Board adopt the recommendations.

The Smith committee was the first Congressional body to recommend changes which would grant greater finality to the reports of the Trial Examiners. The Attorney General's Committee on Administrative Reform did likewise. These recommendations were incorporated in the Taft-Hartley changes in the Act. Presently, under section 10(c) of the Act, Trial Examiners' reports are final unless exceptions are filed within twenty days.

Another proposal to reduce delay, which was frequently mentioned in the 1950's, was to grant more authority to the States. This arose as a problem because of the existence of the power of Federal preemption of jurisdiction over labor disputes in industries in, or affecting, commerce. More particularly, the issue had been raised because of the failure of the Board to assert jurisdiction in certain types of cases, thus leaving a so-called "no man's land" between

State and Federal jurisdiction where neither union, employer, nor individual worker found any agency to whom to turn to for justice. To a degree, this problem was taken care of by the Landrum-Griffin Act (see below).

The Taft-Hartley Act took a step in the other direction, of delaying rather than expediting representation cases. This was done only in the interests of formalizing such proceedings and at the same time other steps were taken to attempt to accelerate such proceedings. But the sum total of the amendments appears to have been to create further delays.

Under the Wagner Act, the Regional Directors of the Board were allowed to proceed with representation cases without any authorization from the Board; their decisions were subject, however, to Board review. A variety of pre-hearing informal proceedings were adopted to expedite such cases and to avoid formal hearings and ordered elections.

The Taft-Hartley amendments prohibited such pre-hearing elections. Regional Directors were given the authority to obtain consent election agreements or to dismiss cases, but only where no new issues of policy were involved. However, despite these means of expediting representation cases, the problem of reducing the time required to certify a bargaining agent or determine that the workers in question do not desire such representation remains a continuing point of criticism of the Board.

The Task Force of the first Hoover Commission recommended in 1949 that pre-hearing elections again be legalized, but with an appeal allowed with the consent of the Regional Director or upon a motion of the Board. Other proposals would have given final authority to Regional Directors in representation cases, subject to review by the Board at will.

Probably the oldest and most persistent proposal to both (1) provide for the separation of the administrative and judicial functions of the Board and (2) expedite proceedings under the Act has been one to transfer jurisdiction over unfair labor practice cases to the Federal District Courts. We have noted above how early efforts to bring such cases before District Courts were rebuffed by the Supreme Court. Representative Anderson and Senator Burke introduced such proposals in the 76th Congress, 1st session in 1939 (H.R. 2761 and S. 1264). Similar proposals were introduced in the 80th Congress by Representative Hoffman (H.R. 880), and in the 81st Congress by Representative Landrum (H.R. 8246).

In 1953 the House Committee on Education and Labor recommended that the Board be divested of its judicial functions and allowed to handle only representation issues. Cases would be argued in the District Courts by attorneys. Parties who could not afford attorneys would be represented by a United States attorney.

Such proposals were supported by spokesmen for management, such as the National Association of Manufacturers and, on occasion, by the U.S. Chamber of Commerce. The feeling was that, if the Board were unable to reduce its backlog of cases, employers and employees should have the right to go directly to the courts to find justice.

However, substantial opposition was raised to these proposals. The courts were said to lack both the specialized knowledge and the experience needed to solve the technical issues. It was also pointed out that only a small portion of the courts' time could be devoted to the handling of NLRA cases. It was further noted that the dockets of the Federal District Courts were already overcrowded.

Along somewhat different lines, the House of Delegates of the American Bar Association in 1955 opposed such proposals because it felt that in labor cases there was a

need for centralized adjudication and for uniformity in case handling.

C. *Since Landrum-Griffin*

The Landrum-Griffin Act [22] included in Title VII several amendments to the Taft-Hartley Act. Only two of these had any substantial direct bearing on the administration of the Act. Both, interestingly enough, concerned administrative delays rather than dealing directly with the separation of functions.

Section 3(b) of the Act was amended to authorize the Board to delegate to its Regional Directors its powers to determine appropriate bargaining units, to investigate and conduct representation elections, and to certify unions for bargaining. The section provided that the Board may, on request of an interested party, review the actions of a Regional Director; but, unless the Board so specifies, such a review will not operate to stay the action taken by the Regional Director.

The other amendment was intended to close the jurisdictional gap we have noted above. Section 14(c) was added to the Act to give the States and their courts full jurisdiction over any dispute which the NLRB refuses to hear. The Board is empowered to broaden its jurisdiction to the fullest extent of the law, thus, potentially, giving it authority to deny almost any jurisdiction to the States; but the amendment prohibits the Board from reducing its jurisdictional standards below those asserted as of July 1, 1959.

The Board acted during 1961 to delegate its representational cases to the Regional Directors as authorized by the Landrum-Griffin Act, including decision whether a question concerning representation exists, determination of the appropriate bargaining unit, and the direction of elections to

[22] P.L. 257, 86th Congress (September 14, 1959).

determine whether employees wish union representation for collective bargaining purposes.

The action taken under the procedure by the Regional Directors are final and subject to discretionary review only on four grounds:

(1) Where a substantial question of law or policy is raised because of (a) the absence of, or (b) the departure from, officially reported precedent;

(2) Where a Regional Director's decision on a substantial factual issue is clearly erroneous, and such error prejudicially affects the rights of a party;

(3) Where the conduct of the hearing in an election case or any ruling made in connection with the proceeding has resulted in prejudicial error;

(4) Where there are compelling reasons for reconsideration of an important Board rule or policy.

This action was taken with a view to accomplishing a major speed-up in the handling of representation cases. The first results showed a drop in an average case-handling time, from filing to direction of election, from 113 days to 34 days. These results have been continued. While by 1966 the average had crept up to 40 days, and the number of such cases filed had continued to increase, cases closed in 1966 were at an all time high.

The situation with respect to unfair labor practice cases is quite different. In 1960, President Kennedy had appointed as his special assistant for regulatory agencies, James M. Landis, Dean of the Harvard Law School and former member of three regulatory boards: the Federal Trade Commission, the Securities and Exchange Commission, and the Civil Aeronautics Board. Dean Landis reviewed the work of all regulatory agencies of the government.

His report [23] recommended against any further separation of functions within such agencies. He recommended centering administrative responsibility for each agency in the chairman of its board, giving the board authority to delegate operating responsibility to panels, members or employees within the agency, subject to discretionary review. This was recommended for NLRB as well as the other agencies.

This report was one of several since 1959 which have examined the question of speeding up the settlement of unfair labor practice cases under the Act. The firm of McKinsey & Co. entered into a contract with the Board in 1958 to study its administrative procedures. Its final report made in January of 1959 addressed itself particularly to the problems of speeding up settlement of such cases.[24]

Its solution on the separation of functions was to give the General Counsel more independent authority, especially in administrative operations, subject only to final review of policy by the Board. It recommended that more of the authority of the Board should be delegated to organizational units within the Board. It also recommended that the decisions of Trial Examiners should be made final unless appealed on the basis of major points of law or Board policy.

A similar conclusion was reached by an Advisory Panel which reported to the Senate Committee on Labor and

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[23] U.S. Congress. Senate. Subcommittee on Administrative Practice. *Report on Regulatory Agencies to President-Elect*, 86th Congress, 2d session.

[24] The report is reprinted in the Pucinski subcommittee hearings. See U.S. Congress. House. Subcommittee on National Labor Relations Board, *Administration of the Labor-Management Relations Act by NLRB*, Appendix, Part 3, 87th Congress, 1st session.

Public Welfare in 1960.[25] Noting that controversies between the General Counsel and the Board had hampered enforcement, it proposed that the Board continue to serve as an adjudicatory agency, but that other administrative responsibility be given to an Administrator responsible for investigation of complaints and the prosecution of cases before the Board.

This panel also recommended that the reports of Trial Examiners be given a greater degree of finality. Review would be permitted only when the findings of fact by the Trial Examiner were clearly erroneous, when exceptions filed raised questions of law or policy, or when the Examiner had obviously not followed the usual course of administrative proceedings.

In May of 1961, President Kennedy submitted Reorganization Plan No. 5 to the Congress, with the support of the Board. The plan authorized the Board to delegate its functions, except those of adjudication and rule-making to a panel, an individual member of the Board, or a Board employee. The intent was to give the Trial Examiners of the Board authority to make final decisions, subject to Board review. The plan reserved to the Board the right to review any such decision or delegated action upon the motion of two or more Board members, either on their own initiative or in response to a request for review by a party or intervenor.

The plan met with opposition and, although favorably reported in the House (the resolution disapproving it was unfavorably reported), the plan was disapproved by a vote of 231 to 179 in July of 1961. Opponents of the plan insisted that it denied litigants the right of mandatory review.

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[25] U.S. Congress. Senate. Advisory Panel on Labor-Management Relations Law. *Organization and Procedure of the NLRB.* Report to Senate Committee on Labor and Public Welfare. Senate Document 81, 86th Congress, 2d session.

Supporters pointed out that the plan in no way affected the right of review by the courts, and that the plan was needed to expedite handling of the Board's case load.[26]

The problem of expediting the work of the Board has attracted other solutions. We have noted above proposals to transfer responsibility for unfair labor practice cases to the Federal District Courts. In 1955 the second Hoover Commission, in recommending the establishment of an Administrative Court of the United States, suggested that it contain a Labor Section to hear cases involving unfair labor practices.[27]

More recently, proposals have been made which would establish a separate Labor Court having such jurisdiction. Bills to this effect were introduced by Senator Hennings in the 85th Congress (S. 3797) and the 86th Congress (S. 1273). Senator Griffin introduced H.R. 11217 in the 1st session of the 89th Congress, while still a member of the House and S. 3631 in the 2d session, as Senator. He has reintroduced it as S. 1353 in the 90th Congress.

That there is a continuing need for expediting the work of the Board in settling unfair labor practice cases is made clear by examining the records of the Board. During fiscal year 1966 a record 15,933 unfair labor practice charges were filed, and 15,587 such cases were closed. The Office of the General Counsel issued 1,936 formal complaints of unfair labor practices, also a record. The 1966 record of 15,933 cases was three times the number filed in 1956, a 200-percent increase in ten years.[28]

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[26] U.S. Congress. House. Committee on Government Operations. *Approving Reorganization Plan No. 5 of 1961.* Report No. 576, 87th Congress, 1st session.

[27] *Op. cit.*, footnote 20.

[28] National Labor Relations Board. *Thirty-First Annual Report . . . for the Fiscal Year Ended June 30, 1966*, p. 3–6.

It should be noted that, while a majority of the charges filed are against employers, the trend is for the number of unfair labor practice charges against employers to fall and the charges of unfair labor practices against unions to rise. In 1965 the charges against employers numbered 10,931; in 1966, 10,902; charges against unions rose from 4,813 in 1965 to 4,941 in 1966. In 1966 there were 1,317 charges of illegal secondary boycotts filed against unions; in 1965 there had been 1,409 such charges.[29]

It should be noted that almost all of the formal consideration of the administrative problems of the Board given by the Congress in recent years has been directed to this problem of making the justice dispensed by the Board swift and sure. This was the burden of the Pucinski subcommittee report in 1961.[30] Allegations of such failure were made to the House committee on Education and Labor in 1965,[31] to the Thompson subcommittee of that Committee in 1966,[32] and again in 1967.[33]

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[29] *Idem.*

[30] U.S. Congress. House. Committee on Education and Labor. Subcommittee on the National Labor Relations Board. Report, *Administration of the Labor-Management Relations Act by the NLRB.* September 1961, 87th Congress, 1st session (1961).

[31] U.S. Congress. House. Committee on Education and Labor. Hearings, *Administration of the National Labor Relations Act,* 89th Congress, 1st session (1965).

[32] U.S. Congress. House. Committee on Education and Labor. Special Subcommittee on Labor. Hearings, *Review of the National Labor Relations Act,* 89th Congress, 2d session (1966).

[33] U.S. Congress. House. Committee on Education and Labor. Special Subcommittee on Labor. Hearings, *To Amend the National Labor Relations Act to Increase Effectiveness of Remedies,* 90th Congress, 1st session (1967).

III. THE ORIGINS OF THE ACT AND THE PROCEDURES OF THE BOARD

Like any historical fact, we tend to take for granted that the way things went was the way they had to go. The corollary for policy is that to get somewhere else you must start from where you now are.

Unfortunately, as far as labor-management policy is concerned, where we are now is in the midst of a legal morass into which we are slowly sinking. The problem is to get out and make a fresh start. But, first, it will be necessary to review briefly how we got there. For that we must go back beyond the Wagner Act to some most significant, but now largely forgotten, legislative and administrative history.

About all that survives in the public mind is that the origin of the Wagner Act was section 7(a) of the National Industrial Recovery Act, which had first guaranteed to the American workers the right to organize and bargain collectively. This Act, in turn, was the first major effort to restore the economy to its operating level of 1929.[34] When the NIRA was invalidated by the Supreme Court, the Wagner Act was enacted to salvage this portion of the law.

This is essentially correct, but it neglects the two-year interim, 1933–1935, in which operating experience was gained under the provisions of section 7(a) of the NIRA by no less than two nation-wide labor boards and countless industry boards.[35] It was during this time that the labor policy later embodied in the Wagner Act was hammered out and the method of its implementation conditioned by events. By 1935, the choices had been made. But in the interim, other choices were possible.

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[34] 48 U.S. Stat. 214 (June 16, 1933).

[35] For a history of these boards, see: Lewis L. Lerwin and Arthur Wubnig, *Labor Relations Boards*, Washington, D.C., The Brookings Institution, 1935.

In 1933 the fundamental labor problem facing the country was not union organization but reemployment and the restoration of the wage structure. "National Industrial Recovery" was the aim of that Act, to get the economy back to its level of operation in 1929. One essential part of that task was the restoration of purchasing power by raising wages and spreading employment.

The National Industrial Recovery Act provided for codes of fair competition in each industry. These were to contain standards, established by agreement between employers and employees, as to maximum hours of labor, minimum rates of pay, and such other conditions of employment as were necessary to accomplish the policy of the Act: ". . . to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry. . . ." [36]

The requirement for bargaining over the labor clauses of codes is contained in section 7(b) of the Act. Section 7(a) was included to assure implementation of section 7(b) by protecting the rights of the workers to organize so that they would have an organized voice in each industry in establishing the codes. Protection of the rights of workers to organize and bargain collectively, under the NIRA, was not so much an end in itself, as a means to a greater end of establishing a voluntarily planned economy, "a great spontaneous co-operation," as the President called it.

During the two years of operating experience under the Act, however, there came to be a general recognition that the apparatus set up was not working and, further, that recovery and restoration of purchasing power would be better attained by less comprehensive and less restrictive means. America's first, and so far only, general attempt

[36] *Op. cit.*, supra, section 1.

at comprehensive economic planning was collapsing into chaos, when it was ended by an adverse Supreme Court decision.[37]

The need for interpretation of the labor provisions of the NIRA first arose because of a need to interpret the President's Re-Employment Agreement. This "blanket code," the basis for the "Blue Eagle" drive to restore purchasing power, was issued on July 27, 1933. It was, in effect, a bilateral contract between the President and the individual employers accepting its provisions. These required an employer to eliminate child labor, limit hours of work, varying between 35 and 40 hours a week, fix minimum wages at from $12 to $15 a week, limit prices, and comply with the provisions of section 7(a) of the NIRA.

One result of the guarantee of the rights of workers to organize was a spreading number of strikes as employers resisted unionization. To meet this spreading strike wave, the President established, without specific legislative authority, the National Labor Board in August of 1933.

The original purpose of the Board was to mediate labor disputes. It soon found that this required interpreting the President's Reemployment Agreement. From this it was drawn into interpreting the labor provisions of the codes as they were established.

Given the combination of a dispute to settle and a body of law and regulation to interpret as a basis for the determination of the rights and responsibilities of the parties to the dispute, the Board came to exercise primarily quasi-judicial functions.

Thus, under this board and its successor, the first National Labor Relations Board, appointed pursuant to Public Resolution No. 44[38] in 1934, there was established a body of

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[37] *Schecter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935).

[38] 48 U.S. Stat. 1183 (June 19, 1934).

"common law," interpreting section 7(a) of the NIRA, and hammered out, case by case. The leading principles have been summarized as follows:

(1) It was unlawful for an employer to impose on his workers any scheme of collective bargaining against their will.

(2) Workers were lawfully free to choose between representation by trade unions or company unions.

(3) The government was to settle representation controversies by elections or by other means of ascertainment.

(4) The labor boards were to define appropriate units for collective bargaining in all cases where questions of this nature were raised.

(5) The labor organization which commanded a majority of the voters among the employees engaged within the collective bargaining unit was entitled to certification as the employees' representative.

(6) The employer was obliged to "recognize" representative labor organizations; that is, to negotiate with them in good faith.

(7) Employers and employee representatives alike were bound to "exert every reasonable effort" to make and maintain collective agreements.

(8) No employer was to lay off, discharge, or otherwise discipline his workers for their union membership or activities.[39]

The boards did not generally possess regulatory authority. That was in the hands of the code authorities, the National Recovery Administration officials, or the President. They entered the scene to handle dispute cases. They left it as quasi-judicial bodies, with four volumes of

[39] Lorwin and Wubnig, *op. cit.*, pp. 450–451.

decisions to their credit.[40] The National Labor Relations Board, established after the demise of the NIRA and these boards, took up where they had left off—as a quasi-judicial agency issuing decisions and making policy, case by case.

There is, however, one difference. The Wagner Act gave the Board regulatory authority. It was and is contained in section 6 of the Act. It has been used only for what are, generally speaking, procedural purposes, not to establish substantive regulatory requirements.

One initial reason for this was, of course, that the Board, like its predecessors, was so overwhelmed from its inception with individual cases that, once it had accepted that its role was also primarily quasi-judicial, it never had the time to sit down and codify policy.

There is another reason. When the Supreme Court invalidated the NIRA with the Schecter decision, it called in question the whole concept of Congressional delegation of authority. Thus, although the Wagner Act was based upon the Federal Trade Commission Act and although the Board was granted regulatory authority, it was reluctant to exercise such authority with vigor. It was even far from clear that Congress had any authority to regulate labor conditions in industries in interstate commerce. This question was not settled until 1937, as we have noted above.

IV. SOME MEANS OF REFORM

We began with a consideration of the operations of the National Labor Relations Board as a regulatory agency. We have shown that its operations have not only been subjected to a running fire of criticism for bias, coming from

[40] For decisions of these boards, see: *Decisions of the National Labor Board, August 1933—March 1934; April 1934—July 1934.* 2 v. (Washington, D.C., 1934); and *Decisions of the National Labor Relations Board, July 9, 1934—December 1934; December 1, 1934—June 16, 1935.* 2 v. (Washington, D.C., 1935).

both labor and management for thirty years, but that *there has been a growing, more fundamental criticism that its operations provide neither swift nor sure justice to labor or management.*

We have not been primarily concerned here with the charge of bias. As has been noted, the charges tend to nullify one another. It is also true that when the criticisms are examined one finds that they are seldom based on anything more than an analysis of a handful of cases; pieces of lawyers' briefs, not objective studies.[41]

What does the analysis suggest might be done to meet the more fundamental criticism? How can labor and management know better what is expected of each under the Labor-Management Relations Act? How can both secure justice, swift and sure, under its provisions?

On the question of the changing structure of the Board to speed its operations, little will be said here. As has been noted, some critics favor a greater internal centralization of authority, such as eliminating or curbing the General Counsel. Others favor greater decentralization, even to the extent of separating the administrative and judicial functions of the Board between two separate agencies, or an agency and the courts.

The problem is one of Congress delegating the correct amount of authority and insisting on its proper exercise. By whom it is to be exercised is, to a degree, a matter of judgment. In any event, the suggestions we shall make can be adapted to any type of administrative arrangement.

The examination which has been made suggests the conclusion that the main reason justice is delayed under the Act is because justice under the Act is not sure. The

[41] See article, referred to above, by Gene S. Booker and Alan Coe, "The NLRB and Its Critics," Labor Law Journal, v. 19, no. 9, September 1966.

Board has failed to make clear to labor and to management what it thinks the Act requires. It has created a lawyers' paradise and a legal nightmare of endless rows of case decisions. It makes policy by rummaging among these, selecting and modifying precedents to suit its current requirements.[42] And under our judicial procedure, this manufacture of policy by basing on, developing, and departing from prior precedent is accepted as being standard judicial practice, as, indeed, it is.

Thus, our study leads us to the conclusion, first, that the problem of speeding up the processes of the Board is not one of further expediting case outflow. Indeed, we are impressed with the fact that the existing Board has done a great deal—probably about as much as can be accomplished along these lines, given its existing powers. If Reorganization Plan No. 12 or the current Thompson bill, H.R. 11725, were put into effect, something more could be done to speed up unfair labor practice cases, but it would appear that representation cases were being handled about as rapidly as adequate consideration permits. Indeed, much of the current criticism of the Board for adopting such short-cuts to settlement of such cases as "card checks" appears to result from their efforts to speed up the handling of representation cases.

The solution would appear to be to cut down the case inflow. Quite clearly, the present procedures of the Board suggest to some elements of both labor and management that the processes of the Board can be used to *delay justice.* If one can distinguish one's case, find an appearance of

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[42] For studies of Board decisions suggesting that environmental factors at the time of decision play a role in influencing such decisions, see the two articles by Gene S. Booker and Cris L. Trafford, "The Predictability of NLRB Decisions," *Labor Law Journal*, v. 16, no. 7, July 1965; and "Environment and NLRB Bias," *Labor Law Journal*, v. 17, no. 4, April 1966.

factual or policy differences, one can, at worst, win delay; at best, win a decision favoring one's own position. Business men are, by definition, risk-takers. *The procedures of the Board are an invitation to take risks, with little fear of loss, and almost a certainty of a measure of gain.*

Our suggestion, and our second point, is that the Board should codify its opinions and reduce them to a series of regulatory bulletins. It does not have to make law, case by case. It could work out its policy, put it in the form of regulations, run them through the Administrative Procedure Act, and put them out for every member of labor and management to read. After thirty years they are, save for new situations, established. They need only be codified.

These bulletins will spell out for all to understand just what our labor policy is under the Act. The regulations could be followed up by the issuance of interpretative bulletins, informative releases, and, if desired (it is certainly needed), a nationwide informational campaign to tell labor and management of their rights and duties under the Act. It might thus fill the informational gap which exists today between the decisions of the Board and the very informative speeches, delivered only to small groups of labor experts, by the Board's members and the General Counsel.

By codifying its requirements, the Board would, of course, divest itself of much of its case load. An employer or a labor leader reading in a regulation what the Board expects will find he need consult his attorney only to make certain he is living up to the requirements of the law, not to find out what they are. The law should be made accessible to those who are required to live by it and whose rights depend upon its meaning. Employees and employers should not be required to go to court to find out what their rights are.

There is ample precedent for such a procedure. The Secretary of Labor, in administering the Fair Labor Standards Act, has, since its inception in 1938, not only put out regulations spelling out detailed requirements under the Act, but has also issued interpretative bulletins explaining the construction he will place on those sections of the Act where he lacks regulatory authority. These interpretations have been recognized by the Supreme Court as "providing a practical guide to employers and employees." Unlike Section 6 of the National Labor Relations Act, which grants *general regulatory authority* to the National Labor Relations Board, the Fair Labor Standards Act grants such authority only with respect to certain of its sections. The National Labor Relations Board could, however, issue such interpretations, which are, in effect, advisory opinions. Such opinions are also issued by the Department of Labor.

It should be noted that, although the language of Section 6 is clear enough, because the Board has seldom in the past issued any regulations with substantive content, and a minimum of procedural ones, *Congress might wish to consider indicating to the Board, in some formal manner, that it considered that the Board possessed this power, and that such power should be exercised.*

Two additional suggestions may be made. First, *Congress has not given the Board power to issue binding orders and decisions which would be self-enforcing.* If the Board spells out exactly how it intends to exercise its authority by issuing regulations and interpretations as suggested, Congress might consider granting this authority, which is commonly possessed by other regulatory agencies of the government. Congress will then know how it will be exercised.

Finally, Congress long ago took from the Board the power to consider its problems in any light other than a

narrowly legal one when it forbade it from making economic studies of labor-management relations and of the effects of its decisions. If the Board has been, at times, blind, it is in part because it was blinded. *Congress might consider specifically authorizing such studies.*

It is hoped that, in examining the problem of the separation of powers with respect to the Board, the Congress will look behind the surface charges to the basic truth that, in creating a regulatory commission, like the Board, Congress gives to it *a combination of powers,* a power of delegation which Congress alone possesses. This renders the function of Congressional oversight of the utmost importance. Only Congress can exercise effective oversight over a regulatory agency. Only Congress can correct an improper exercise of the powers it has delegated. Checks and balance do not work within such an agency, no matter how much formal separation of powers is written into the mandate. (Reprint from Daily Labor Report, Number 39, February 27, 1969.)

OPINION

SUPREME COURT OF THE UNITED STATES

No. 463.—October Term, 1968.

National Labor Relations Board, Petitioner, v. Wyman-Gordon Company.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[April 23, 1969.]

Mr. Justice Fortas announced the judgment of the Court and delivered an opinion in which The Chief Justice, Mr. Justice Stewart, and Mr. Justice White join.

On the petition of the International Brotherhood of Boilermakers and pursuant to its powers under § 9 of the National Labor Relations Act, 29 U. S. C. § 159, the National Labor Relations Board ordered an election among the production and maintenance employees of the respondent company. At the election, the employees were to select one of two labor unions as their exclusive bargaining representative, or to choose not to be represented by a union at all. In connection with the election, the Board ordered the respondent to furnish a list of the names and addresses of its employees who could vote in the election, so that the unions could use the list for election purposes. The respondent refused to comply with the order, and the election was held without the list. Both unions were defeated in the election.

The Board upheld the union's objections to the election because the respondent had not furnished the list, and the Board ordered a new election. The respondent again refused to obey a Board order to supply a list of employees, and the Board issued a subpoena ordering the respondent to provide the list or else produce its personnel and payroll records showing the employees' names and

addresses. The Board filed an action in the United States District Court for the District of Massachusetts seeking to have its subpoena enforced or to have a mandatory injunction issued to compel the respondent to comply with its order.

The District Court held the Board's order valid and directed the respondent to comply. 270 F. Supp. 280 (1967). The United States Court of Appeals for the First Circuit reversed. 397 F. 2d 394 (1968). The Court of Appeals thought that the order in this case was invalid because it was based on a rule laid down in an earlier decision by the Board, *Excelsior Underwear, Inc.*, 156 N. L. R. B. 1236 (1966), and the *Excelsior* rule had not been promulgated in accordance with the requirements that the Administrative Procedure Act prescribes for rule-making, 5 U. S. C. § 553. We granted certiorari to resolve a conflict among the circuits concerning the validity and effect of the *Excelsior* rule. 393 U. S. 932 (1968).[1]

I.

The *Excelsior* case involved union objections to the certification of the results of elections that the unions had lost at two companies. The companies had denied

[1] When we granted certiorari, the Fifth Circuit had expressly approved the procedure the Board followed in adopting the *Excelsior* rule. *Howell Refining Co.* v. *NLRB*, 400 F. 2d 213 (1968). Two other circuits had approved enforcement of the *Excelsior* rule without explicitly passing on the correctness of the method by which it was adopted. *NLRB* v. *Hanes Hosiery Division*, 384 F. 2d 188 (C. A. 4th Cir. 1967); *NLRB* v. *Roblen*, 385 F. 2d 52 (C. A. 7th Cir. 1967). After our grant of certiorari in the present case, three more Courts of Appeals explicitly upheld the *Excelsior* rule and the procedure by which it was adopted, *NLRB* v. *Beech-Nut Life Savers, Inc.*, — F. 2d — (C. A. 2d Cir. 1968); *British Auto Parts, Inc.* v. *NLRB*, — F. 2d — (C. A. 9th Cir. 1968); *NLRB* v. *Q-T Shoe Mfg. Co.*, — F. 2d — (C. A. 3d Cir. 1969); and the Fifth Circuit reaffirmed its earlier holding in *Howell Refining Co., Groendyke Transport, Inc.* v. *Davis*, — F. 2d — (1969).

to the unions a list of the names and addresses of employees eligible to vote. In the course of the proceedings, the Board "invited certain interested parties" to file briefs and to participate in oral argument of the issue whether the Board should require the employer to furnish lists of employees. 156 N. L. R. B., at 1238. Various employer groups and trade unions did so, as *amici curiae*. After these proceedings, the Board issued its decision in *Excelsior*. It purported to establish the general rule that such a list must be provided, but it declined to apply its new rule to the companies involved in the *Excelsior* case. Instead, it held that the rule would apply "only in those elections that are directed, or consented to, subsequent to 30 days from the date of [the] Decision." *Id.*, at 1240, n. 5.

Specifically, the Board purported to establish "a requirement that will be applied in all election cases. That is, within 7 days after the Regional Director has approved a consent-election agreement entered into by the parties . . . , or after the Regional Director or the Board has directed an election . . . , the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed." *Id.*, at 1239–1240.

Section 6 of the National Labor Relations Act empowers the Board "to make . . . , in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act." 29 U. S. C. § 156. The Administrative Procedure Act contains specific provisions governing agency rule-making, which it defines as "an agency statement of general or particular applicability and fu-

ture effect," 5 U. S. C. § 551 (6).[1] The Act requires, among other things, publication in the Federal Register of notice of proposed rule-making and of hearing; opportunity to be heard; a statement in the rule of its basis and purposes; and publication in the Federal Register of the rule as adopted. See 5 U. S. C. § 553. The Board asks us to hold that it has discretion to promulgate new rules in adjudicatory proceedings, without complying with the requirements of the Administrative Procedure Act.

The rule-making provisions of that Act, which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application. See H. R. Rep. No. 1980, 79th Cong., 2d Sess., 21–26 (1946); S. Rep. No. 752, 79th Cong., 1st Sess., 13–16 (1945). They may not be avoided by the process of making rules in the course of adjudicatory proceedings. There is no warrant in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention. Apart from the fact that the device fashioned by the Board does not comply with statutory command, it obviously falls short of the substance of the requirements of the Administrative Procedure Act. The "rule" created in *Excelsior* was not published in the Federal Register which is the statutory and accepted means of giving notice of a rule as adopted; only selected organizations were given notice of the "hearing," whereas notice in the Federal Register would have been general in character; under the Administrative Procedure Act, the terms or substance of the rule would have to be stated in the notice of hearing, and all interested par-

[1] We agree with the opinion of Chief Judge Aldrich below that the *Excelsior* rule involves matters of substance and that it therefore does not fall within any of the Act's exceptions. See 5 U. S. C. § 553 (b) (A).

ties would have an opportunity to participate in the rule-making.

The Solicitor General does not deny that the Board ignored the rule-making provisions of the Administrative Procedure Act.[3] But he appears to argue that *Excelsior*'s command is a valid substantive regulation, binding upon this respondent as such, because the Board promulgated it in the *Excelsior* proceeding, in which the requirements for valid adjudication had been met. This argument misses the point. There is no question that, in an adjudicatory hearing, the Board could validly decide the issue whether the employer must furnish a list of employees to the union. But that is not what the Board did in *Excelsior*. The Board did not even apply the rule it made to the parties in the adjudicatory proceedings, the only entities that could properly be subject to the order in that case. Instead, the Board purported to make a rule: *i. e.*, to exercise its quasi-legislative power.

Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. See Friendly, The Federal Administrative Agencies 36–52 (1962).[4] They

[3] The Board has never utilized the Act's rule-making procedures. It has been criticised for contravening the Act in this manner. See, *e. g.*, 1 Davis, Administrative Law § 6.13 (Supp. 1967); Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L. J. 729 (1961).

[4] The Solicitor General argues that this Court has previously approved "rules" articulated by the Board in the adjudication of particular cases without questioning the propriety of that procedure. He cites *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793 (1945); *NLRB* v. *A. J. Tower Co.*, 329 U. S. 324 (1946); *NLRB* v. *Seven-Up Bottling Co.*, 344 U. S. 344 (1953); and *Brooks* v. *NLRB*, 348 U. S. 96 (1954). In none of these cases has this Court ruled upon or sanctioned the exercise of quasi-legislative power—*i. e.*, rule-making—without compliance with § 6 of the NLRA and the rule-making provisions of the Administrative Procedure Act.

generally provide a guide to action that the agency may be expected to take in future cases. Subject to the qualified role of *stare decisis* in the administrative process, they may serve as precedents. But this is far from saying, as the Solicitor General suggests, that commands, decisions, or policies announced in adjudication are "rules" in the sense that they must, without more, be obeyed by the affected public.

In the present case, however, the respondent itself was specifically directed by the Board to submit a list of the names and addresses of its employees for use by the unions in connection with the election.[5] This direction, which was part of the order directing that an election be held, is unquestionably valid. See, *e. g.*, *NLRB* v. *Waterman S. S. Co.*, 309 U. S. 206, 226 (1940). Even though the direction to furnish the list was followed by citation to *"Excelsior Underwear, Inc.*, 156 NLRB No. 111," it is an order in the present case that the respondent was required to obey. Absent this direction by the Board, the respondent was under no compulsion to furnish the list because no statute and no validly adopted rule required it to do so.

Because the Board in an adjudicatory proceeding directed the respondent itself to furnish the list, the decision of the Court of Appeals for the First Circuit must be reversed.[6]

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[5] In his Decision and Direction of Election, the Regional Director ordered that "[a]n eligibility list, containing the names and addresses of all the eligible voters, must be filed with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election . . ."

[6] MR. JUSTICE HARLAN'S dissent argues that because the Board improperly relied upon the *Excelsior* "rule" in issuing its order, we are obliged to remand. He relies on *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80 (1943). To remand would be an idle and useless formality. *Chenery* does not require that we convert judicial review

II.

The respondent also argues that it need not obey the Board's order because the requirement of disclosure of employees' names and addresses is substantively invalid. This argument lacks merit. The objections that the respondent raises to the requirement of disclosure were clearly and correctly answered by the Board in its *Excelsior* decision. All of the United States Courts of Appeals that have passed on the question have upheld the substantive validity of the disclosure requirement,[7] and the court below strongly intimated a view that the requirement was substantively a proper one, 397 F. 2d, at 396.

We have held in a number of cases that Congress granted the Board a wide discretion to ensure the fair and free choice of bargaining representatives. See, *e. g.*, *NLRB* v. *Waterman S. S. Co.*, *supra*, at 226; *NLRB* v. *A. J. Tower Co.*, 329 U. S. 324, 330 (1946). The disclosure requirement furthers this objective by encouraging an informed employee electorate and by allowing unions the right of access to employees that management already possesses. It is for the Board and not for this Court to weigh against this interest the asserted interest of employees in avoiding the problems that union solicitation may present.

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of agency action into a ping-pong game. In *Chenery*, the Commission had applied the wrong standards to the adjudication of a complex factual situation, and the Court held that it would not undertake to decide whether the Commission's result might have been justified on some other basis. Here, by contrast, the substance of the Board's command is not seriously contestable. There is not the slightest uncertainty as to the outcome of a proceeding before the Board, whether the Board acted through a rule or an order. It would be meaningless to remand.

[7] See *NLRB* v. *J. P. Stevens & Co.*, — F. 2d — (C. A. 4th Cir. 1969), and the cases cited in n. 1, *supra*.

III.

The respondent contends that even if the disclosure requirement is valid, the Board lacks power to enforce it by subpoena. Section 11 (1) of the National Labor Relations Act provides that the Board shall have access to "any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question," and empowers the Board to issue subpoenas "requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation." Section 11 (2) gives the district courts jurisdiction, upon application by the Board, to issue an order requiring a person who has refused to obey the Board's subpoena "to appear before the Board . . . there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question . . . ." 29 U. S. C. §§ 161 (1)–(2).

The respondent takes the position that these statutory provisions do not give the Board authority to subpoena the lists here in question because they are not "evidence" within the meaning of the statutory language. The District Court held, however, that "in the context of § 11 of the Act, 'evidence' means not only proof at a hearing but also books and records and other papers which will be of assistance to the Board in conducting a particular investigation."[3] The courts of appeals that have passed on the question have construed the term "evidence" in a similar manner. *NLRB* v. *Hanes Hosier Division*, 384 F. 2d 188, 191–192 (C. A. 4th Cir. 1967). See *NLRB* v. *Rohlen*, 385 F. 2d 52, 55–58 (C. A. 7th Cir. 1967); *NLRB* v. *Beech-Nut Life Savers, Inc.*, — F. 2d —, — — — (C. A. 2d Cir. 1968); *British Auto Parts, Inc.*

[3] The Court of Appeals did not reach the issue whether the Board could subpoena the lists in question.

v. *NLRB*, — F. 2d —, — - - — (C. A. 9th Cir. 1968); *NLRB* v. *Q-T Shoe Mfg. Co.*, — F. 2d — (C. A. 3d Cir. 1969). We agree that the list here in issue is within the scope of § 11 so that the Board's subpoena power may be validly exercised.

The judgment of the Court of Appeals is reversed, and the case is remanded to the District Court with directions to reinstate its judgment.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 463.—October Term, 1968.

National Labor Relations Board, Petitioner, v. Wyman-Gordon Company. | On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[April 23, 1969.]

Mr. Justice Black, with whom Mr. Justice Brennan and Mr. Justice Marshall join, concurring in the result.

I agree with Parts II and III of the prevailing opinion of Mr. Justice Fortas, holding that the *Excelsior* requirement[1] that an employer supply the union with the names and addresses of its employees prior to an election is valid on its merits and can be enforced by a subpoena. But I cannot subscribe to the criticism in that opinion of the procedure followed by the Board in adopting that requirement in the *Excelsior* case, 156 N. L. R. B. 1236 (1966). Nor can I accept the novel theory by which the opinion manages to uphold enforcement of the *Excelsior* practice in spite of what it considers to be statutory violations present in the procedure by which the requirement was adopted. Although the opinion is apparently

[1] This requirement first announced in the *Excelsior* case, 156 N. L. R. B. 1236 (1966), has often been referred to by both the Board, the lower courts, and the commentators as "the *Excelsior* rule." I understand the use of the word "rule" in this context to imply simply that the requirement is a rule of law such as would be announced in a court opinion and not necessarily that it is the kind of "rule" required to be promulgated in accordance with the "rule making" procedures of the Administrative Procedure Act. For the sake of clarity, however, I have chosen in this opinion to avoid use of the word "rule" when referring to the procedure required by the *Excelsior* decision.

intended to rebuke the Board and encourage it to follow the plurality's conception of proper administrative practice, the result instead is to free the Board from all judicial control whatsoever regarding compliance with procedures specifically required by applicable federal statutes such as the National Labor Relations Act, 29 U. S. C. § 151 *et seq.*, and the Administrative Procedure Act, 5 U. S. C. § 551 *et seq.* Apparently, under the prevailing opinion, courts must enforce any requirement announced in a purported "adjudication" even if it clearly was not adopted as an incident to the decision of a case before the agency, and must enforce "rules" adopted in a purported "rule making" even if the agency materially violated the specific requirements that Congress has directed for such proceedings in the Administrative Procedure Act. I for one would not give judicial sanction to any such illegal agency action.

In the present case, however, I am convinced that the *Excelsior* practice was adopted by the Board as a legitimate incident to the adjudication of a specific case before it, and for that reason I would hold that the Board properly followed the procedures applicable to "adjudication" rather than "rule making." Since my reasons for joining in reversal of the Court of Appeals differ so substantially from those set forth in the prevailing opinion, I will spell them out at some length.

Most administrative agencies, like the Labor Board here, are granted two functions by the legislation creating them: (1) the power under certain conditions to make rules having the effect of laws, that is, generally speaking, quasi-legislative power; and (2) the power to hear and adjudicate particular controversies, that is quasi-judicial power. The line between these two functions is not always a clear one and in fact the two functions merge at many points. For example, in exercising its quasi-judicial function an agency must frequently

decide controversies on the basis of new doctrines, not theretofore applied to a specific problem, though drawn to be sure from broader principles reflecting the purposes of the statutes involved and from the rules invoked in dealing with related problems. If the agency decision reached under the adjudicatory power becomes a precedent, it guides future conduct in much the same way as though it were a new rule promulgated under the rule-making power, and both an adjudicatory order and a formal "rule" are alike subject to judicial review. Congress gave the Labor Board both of these separate but almost inseparably related powers.[2] No language in the National Labor Relations Act requires that the grant or the exercise of either power was intended to exclude the Board's use of the other.

Nor does any language in the Administrative Procedure Act require such a conclusion. The Act does specify the procedure by which the rule-making power is to be exercised, requiring publication of notice for the benefit of interested parties and provision of an opportunity for them to be heard, and after establishment of a rule as provided in the Act, it is then to be published in the Federal Register. Congress had a laudable purpose in prescribing these requirements, and it was evidently contemplated that administrative agencies like the Labor Board would follow them when setting out to announce a new rule of law to govern parties in the future. In this same statute, however, Congress also conferred on the effected administrative agencies the power to proceed by adjudication, and Congress specified a distinct procedure by which this adjudicatory power is to be exercised.[3] The Act defines "adjudication" as

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[2] See National Labor Relations Act §§ 6, 9 (c) (1), 10; 29 U. S. C. §§ 156, 159 (c) (1), 160.

[3] The procedure to be followed in "adjudication," which includes notice of the issues, an opportunity for responsive pleadings, a hearing, and decision, is specified in 5 U. S. C. §§ 554, 556, and 557. The

"agency process for the formulation of an order," and "order" is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U. S. C. §§ 551 (7), (6). Thus, although it is true that the adjudicatory approach frees an administrative agency from the procedural requirements specified for rule making, the Act permits this to be done whenever the action involved can satisfy the definition of "adjudication" and then imposes separate procedural requirements that must be met in adjudication. Under these circumstances, so long as the matter involved can be dealt with in a way satisfying the definition of either "rule making" or "adjudication" under the Administrative Procedure Act, that Act, along with the Labor Relations Act, should be read as conferring upon the Board the authority to decide, within its informed discretion, whether to proceed by rule making or adjudication. Our decision in *Securities Comm'n* v. *Chenery Corp.*, 332 U. S. 194 (1947), though it did not involve the Labor Board or the Administrative Procedure Act, is therefore equally applicable here. As we explained in that case, "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *Id.*, at 203.

In the present case there is no dispute that all the procedural safeguards required for "adjudication" were fully satisfied in connection with the Board's *Excelsior* decision, and it seem plain to me that that decision did constitute "adjudication" within the meaning of the

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Administrative Procedure Act expressly exempts proceedings for "the certification of worker representatives" from there requirements, 5 U. S. C. §§ 554 (a)(6), 556 (a), 557 (a), and these proceedings are therefore governed only by the requirements specified in the National Labor Relations Act, 29 U. S. C. § 151 *et seq.*

Administrative Procedure Act, even though the requirement was to be prospectively applied. See *Great Northern R. Co.* v. *Sunburst Co.*, 287 U. S. 358 (1932). The Board did not abstractly decide out of the blue to announce a brand new rule of law to govern labor activities in the future, but rather established the procedure as a direct consequence of the proper exercise of its adjudicatory powers. Sections 9 (c)(1) and (2) of the Labor Relations Act empower the Board to conduct investigations, hold hearings, and supervise elections to determine the exclusive bargaining representative that the employees wish to represent them. This is a key provision of the plan Congress adopted to settle labor quarrels that might interrupt the free flow of commerce. A controversy arose between the Excelsior Company and its employees as to the bargaining agent the employees desired to act for them. The Board's power to provide the procedures for the election was invoked, an election was held, and the losing unions sought to have that election set aside. Undoubtedly the Board proceeding for determination of whether to confirm or set aside that election was "agency process for the formulation of an order" and thus was "adjudication" within the meaning of the Administrative Procedure Act.

The prevailing opinion seems to hold that the *Excelsior* requirement cannot be considered the result of adjudication because the Board did not apply it to the parties in the *Excelsior* case itself, but rather announced that it would be applied only to elections called 30 days after the date of the *Excelsior* decision. But the *Excelsior* order was nonetheless an inseparable part of the adjudicatory process. The principal issue before the Board in the *Excelsior* case was whether the election should be set aside on the ground, urged by the unions, that the employer had refused to make the employee lists available to them. See 156 N. L. R. B., at 1236–1238. The

Board decided that the election involved there should not be set aside, and thus rejected the contention of the unions. In doing so, the Board chose to explain the reasons for its rejection of their claim, and it is this explanation, the Board's written opinion, which is the source of the *Excelsior* requirement. The Board's opinion should not be regarded as any less an appropriate part of the adjudicatory process merely because the reason it gave for rejecting the unions' position was not that the Board disagreed with them as to the merits of the disclosure procedure but rather, see 156 N. L. R. B., at 1239, 1240, n. 5, that while fully agreeing that disclosure should be required, the Board did not feel that it should upset the Excelsior Company's justified reliance on previous refusals to compel disclosure by setting aside this particular election.

Apart from the fact that the decisions whether to accept a "new" requirement urged by one party and, if so, whether to apply it retroactively to the other party are inherent parts of the adjudicatory process, I think the opposing theory accepted by the Court of Appeals and by the prevailing opinion today is a highly impractical one. In effect, it would require an agency like the Labor Board to proceed by adjudication only when it could decide, *prior* to adjudicating a particular case, that any new practice to be adopted would be applied retroactively. Obviously, this decision cannot properly be made until all the issues relevant to adoption of the practice are fully considered in connection with the final decision of that case. If the Board were to decide, after careful evaluation of all the arguments presented to it in the adjudicatory proceeding, that it might be fairer to apply the practice only prospectively, it would be faced with the unpleasant choice of either starting all over again to evaluate the merits of the question, this time in a "rule-making" proceeding, or overriding the con-

sideratons of fairness and applying its order retroactively anyway, in order to preserve the validity of the new practice and avoid duplication of effort. I see no good reason to impose any such inflexible requirement on the administrative agencies.

For all of the foregoing reasons I would hold that the Board acted well within its discretion in choosing to proceed as it did, and I would reverse the judgment of the Court of Appeals on this basis.

SUPREME COURT OF THE UNITED STATES

No. 463.—October Term, 1968.

National Labor Relations Board, Petitioner, *v.* Wyman-Gordon Company.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[April 23, 1969.]

Mr. Justice Douglas, dissenting.

The Administrative Procedure Act, 5 U. S. C. § 553 (b) provides that general notice "of proposed rule making" shall be published in the Federal Register. Public participation—in essence a hearing—is provided, § 553 (c). And "interested" persons are given the right to petition for the issuance, amendment, or repeal of a rule, 5 U. S. C. § 553 (e).

In *Excelsior Underwear, Inc.*, 156 N. L. R. B. 1236, the Board in 1966 decided (1) that an employer would be required to furnish the Regional Director, prior to the conducting of a representation election, the names and addresses of the eligible voters, which list would then be made available to all contestants in the election, but that (2) that this requirement would apply only prospectively, to all elections directed or consented to subsequent to 30 days after the date of its decision there.

The notice and hearing procedure prescribed by § 553 (b) was not followed; and in this case, an election was directed seven months after the *Excelsior* decision, the Board applying the *Excelsior* rule.

I am willing to assume that, if the Board decided to treat each case on its special facts and perform its adjudicatory function in the conventional way, we should have no difficulty in affirming its action. The difficulty is that it chose a different course in the *Excelsior* case

and having done so, it should be bound to follow the procedures prescribed in the Act as my Brother HARLAN has outlined them. When we hold otherwise, we let the Board "have its cake and eat it too."

The Committee reports make plain that the Act "provides quite different procedures for the 'legislative' and 'judicial' functions of administrative agencies." S. Rep. No. 752, 79th Cong., 1st Sess., p. 7; H. R. Rep. No. 1980, 79th Cong., 2d Sess., p. 17.

Section 553 (b)(3) provides in part:

> "Except when notice or hearing is required by statute, this subsection does not apply—
>
> "(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."

We need not stop to inquire what the word "procedure" in that context embraces. For § 553 (d) provides, with exceptions not material[1] here that:

> "The required publication or service of a substantive rule shall be made not less than 30 days before its effective date. . . ."

The Board apparently decided the *Excelsior* case with § 553 (d) in mind, for it made the proposed new rule effective in 30 days. The House report states that § 553 (d) (which was § 4 (c) in its draft) "does not

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[1] The rule-making provision does not apply to

"(1) a military or foreign affairs function of the United States; or

"(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U. S. C. § 553 (a).

These exceptions exclude, *inter alia*, the National Forest Service, the National Park System, the Bureau of Land Management, and other agencies dealing with "public property" such as the Interior Department and its leases of off-shore oil properties.

For a compilation of federal agency rules on rule-making see Pike and Fisher, Administrative Law (2d series 1951).

provide procedures alternative to notice and other public proceedings required by the prior sections." *Id.*, p. 259. And that report added, "It will afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take any other action which the issuance of rules may prompt." *Id.*, p. 259. And see S. Rep., *op. cit., supra,* p. 201.

The "substantive" rules described by § 553 (d) may possibly cover "adjudications," even though they represent performance of the "judicial" function. But it is no answer to say that the order under review was "adjudicatory." For as my Brother HARLAN says, an agency is not adjudicating when it is making a rule to fit future cases. A rule like the one in *Excelsior* is designed to fit all cases at all times. It is not particularized to special facts. It is a statement of far-reaching policy covering all future representative elections.

It should therefore have been put down for the public hearing prescribed by the Act.

The rule-making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that are forthcoming. It gives an opportunity for persons affected to be heard. Recently the proposed Rules of the Federal Highway Administration governing the location and design of freeways, 33 Fed. Reg. 15663, were put down for a hearing; and the Governor of every State appeared or sent an emissary. The result was a revision of the Rules before they were promulgated. 34 Fed. Reg. 727.

That is not an uncommon experience. Agencies discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice. See Friendly, The Federal Administration Agencies, p. 45 (1962).

This is a healthy process that helps make a society viable. The multiplication of agencies and their growing

power makes them more and more remote from the people affected by what they do and makes more likely the arbitrary exercise of their powers. Public airing of problems through rulemaking makes the bureaucracy more responsive to public needs and is an important brake on the growth of absolutism in the regime that now governs all of us.

Many federal agencies touch on numerous aspects of the lives of the poor. Rulemaking for this group is discussed in Bonfield, Representation for the Poor in Federal Rulemaking, 67 Mich. L. Rev. 511, 512:

> "An agency promulgating rules affecting the poor cannot assume that it automatically knows what is best for such people. Government administrators are usually persons with middle-class backgrounds, experiences, and associations; therefore, they tend to have middle-class viewpoints, orientations, and understandings. This means that the personnel of federal agencies may be expected to reflect more accurately the interests of the affluent than those of the economically underprivileged. Consequently, there is a special reason for concern when, as is now the case, the interests of poor people are inadequately represented in the rulemaking process."

While that suggestion may not be relevant to the present labor-management area and the sophisticated opponents with which this case is concerned, it does illustrate that when we are lax and allow federal agencies to play fast and loose with rulemaking, we set a precedent with dangerous repercussions.

It has been stated that "the survival of a questionable rule seems somewhat more likely when it is submerged in the facts of a given case" than when rulemaking is used. See Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921, 946–947 (1965). Moreover,

"agencies appear to be freer to disregard their own prior decisions than they are to depart from their regulations." *Id.*, p. 947. Failure to make full use of rulemaking power is attributable at least in part "to administrative intertia and reluctance to take a clear stand." *Id.*, p. 972.

Rulemaking is no cure-all; but it does force important issues into full public display and in that sense makes for more responsible administrative action.

I would hold the agencies governed by the rulemaking procedure strictly to its requirements and not allow them to play free and loose as the National Labor Relations Board apparently likes to do.[2]

As stated by the Court of Appeals, the procedure used in the *Excelsior* case plainly flouted the Act:

> "Recognizing the problem to be one affecting more than just the parties before it, the Board chose to solicit the assistance of selected amici curiae, and, ultimately, to establish a rule which not only did not apply to the parties before it, but did not take effect for thirty days. In so doing we consider that the Board, to put it bluntly, designed its own rule-making procedure, adopting such part of the Congressional mandate as it chose, and rejecting the rest." 397 F. 2d 394, 396–397.

I would affirm the judgment.

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[2] "The NLRB has never used its rule-making power; it misuses the methods of adjudication for making rules, and it uses press releases not published in the Federal Register, for announcing policies that ought to be embodied in formal rules. It seems to be violating § 3 and § 4 of the Administrative Procedure Act, and the result in some instances is serious injustice." 1 Davis, Administrative Law § 6.13 (1967 Supp.). And see Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L. J. 729 (1961).

SUPREME COURT OF THE UNITED STATES

No. 463.—October Term, 1968.

National Labor Relations Board, Petitioner, v. Wyman-Gordon Company.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[April 23, 1969.]

Mr. Justice Harlan, dissenting.

The language of the Administrative Procedure Act does not support the Government's claim that an agency is "adjudicating" when it announces a rule which it refuses to apply in the dispute before it. The Act makes it clear that an agency "adjudicates" only when its procedures result in the "formulation of an *order*." 5 U. S. C. § 551 (7). (Emphasis supplied.) An "order" is defined to include "The whole or *part* of a final disposition . . . of an agency *in a matter other than rule making*. . . ." 5 U. S. C. § 551 (6). (Emphasis supplied.) This definition makes it apparent that an agency is not adjudicating when it is making a rule, which the Act defines as "an agency statement of general or particular applicability and *future effect*. . . ." 5 U. S. C. § 551 (4). (Emphasis supplied.) Since the Labor Board's *Excelsior* rule was to be effective only 30 days after its promulgation, it clearly falls within the rule-making requirements of the Act.[1]

Nor can I agree that the natural interpretation of the statute should be rejected because it requires the agency

[1] For the reasons advanced by Chief Judge Aldrich in his opinion below, — F. 2d —, I think it clear that the *Excelsior* rule involves matters of substance and not procedure, and so does not fall within the exception created by 5 U. S. C. § 553 (b)(A) of the Act.

to choose between giving its rules immediate effect or initiating a separate rule-making proceeding. An agency chooses to apply a rule prospectively only because it represents such a departure from pre-existing understandings that it would be unfair to impose the rule upon the parties in pending matters. But it is precisely in these situations, in which established patterns of conduct are revolutionized, that rule-making procedures perform the vital functions that my Brother DOUGLAS describes so well in a dissenting opinion with which I basically agree.

Given the fact that the Labor Board has promulgated a rule in violation of the governing statute, I believe that there is no alternative but to affirm the judgment of the Court of Appeals in this case. If, as the plurality opinion suggests, the NLRB may properly enforce an invalid rule in subsequent adjudications, the rule-making provisions of the Administrative Procedure Act are completely trivialized. Under today's prevailing approach, the agency may evade the commands of the Act whenever it desires and yet coerce the regulated industry into compliance. It is no answer to say that "respondent was under no compulsion to furnish the list because no statute and no validly adopted rule required it to do so," *ante*, at 6, when the Labor Board was threatening to issue a subpoena which the courts would enforce. In what other way would the administrative agency compel obedience to its invalid rule?

One cannot always have the best of both worlds. Either the rule-making provisions are to be enforced or they are not. Before the Board may be permitted to adopt a rule that so significantly alters pre-existing labor-management understandings, it must be required to conduct a satisfactory rule-making proceeding, so that it will have the benefit of wide-ranging argument before it enacts its proposed solution to an important problem.

In refusing to adopt this position, the prevailing opinion does not only undermine the Administrative Procedure Act, but also compromises the most basic principles governing judicial review of agency action established in our past decisions. This Court's landmark opinion in *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, 94 (1943), makes it clear that we are obliged to remand a case if the agency has relied upon an improper reason to justify its action:

> "If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order cannot stand if the agency has misconceived the law. In either event the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."

Chenery's teachings are applicable here. The Regional Office that issued the order under review refused to consider the merits of the arguments against the *Excelsior* rule which were raised by Wyman-Gorman on the ground that they had been rejected by the Board in the *Excelsior* case itself:

> ". . . it is well known that *Excelsior* issued only after oral argument and briefs, including *amicus curiae* briefs by interested parties. The Board has considered arguments such as those made here and nevertheless established the requirement embodied in *Excelsior* and the undersigned [Acting Regional Director] is bound by it." Appendix, p. 33.

The Board denied review of this decision on the ground that "it raises no substantial issues warranting review." Appendix, p. 35.

Since the major reason the Board has given in support of its order is invalid, *Chenery* requires remand. See also *Bell* v. *United States*, 366 U. S. 393, 412–413 (1961); *Burlington Truck Lines* v. *United States*, 371 U. S. 156, 167–168 (1962); cf. *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 196–197 (1941). The prevailing opinion explains its departure from our leading decisions in this area on the ground that "There is not the slightest uncertainty as to the outcome of [this] proceeding" on remand. *Ante*, at 7, n. 6. I can perceive no justification whatever for this assertion. Since the *Excelsior* rule was invalidly promulgated, it is clear that, at a minimum, the Board is obliged on remand to recanvass all of the competing considerations before it may properly announce its decision in this case.[2] We cannot know what the outcome of such a reappraisal will be. Surely, it cannot be stated with any degree of certainty that the Board will adopt precisely the same solution as the one which was embraced in *Excelsior*. The plurality simply usurps the function of the National Labor Relations Board when it says otherwise.

I would affirm the judgment of the Court of Appeals.

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[2] As I have indicated, *supra*, at 2, I would go further and require the Board to initiate a new rule-making proceeding where, as here, it has previously recognized that the proposed new rule so departs from prior practices that it cannot fairly be applied retroactively. In the absence of such a proceeding, the administrative agency must be obliged to follow its earlier decisions which did not require employers to furnish *Excelsior* lists to unions during organizing campaigns.

